

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

BABY DOE, et al,)
Plaintiffs,) CIVIL ACTION NO.
v.) 3:22cv49
JOSHUA MAST, et al,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS
(MOTIONS HEARING)

Charlottesville, Virginia
May 29, 2024

BEFORE: THE HONORABLE NORMAN K. MOON,
Senior United States District Judge

APPEARANCES:

COUNSEL FOR THE PLAINTIFFS:

HUNTON & WILLIAMS LLP
By: Maya Miriam Eckstein
Lewis Franklin Powell, III
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 Appearances Cont:

2 HUNTON ANDREWS KURTH LLP
3 By: Kevin Spencer Elliker
4 Riverfront Plaza, East Tower
5 951 E. Byrd Street
6 Richmond, VA 23219

7 LATHAM & WATKINS LLP
8 By: Ehson Kashfipour
9 555 Eleventh Street, NW, Suite 1000
10 Washington, DC 20004

11 COUNSEL FOR THE DEFENDANTS:

12 MCGUIRE WOODS LLP
13 By: John Savage Moran
14 888 16th Street, N.W., Suite 500
15 Washington, DC 20006

16 FIRST & FOURTEENTH PLLC
17 By: Michael Lee Francisco
18 800 Connecticut Ave, NW, Suite 300
19 Washington, DC 20006

20 ALSO PRESENT - COUNSEL FOR JONATHAN MAST:

21 HARDING COUNSEL, PLLC
22 By: Elliott M. Harding
23 2805 Meadow Vista Dr.
24 Charlottesville, VA 22901

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 (Proceedings commenced at 12:57 p.m.)

2 THE COURT: Good afternoon. Call the case, please.

3 THE CLERK: This is the matter of Baby Doe, et al v.
4 Joshua Mast, et al, civil action number 3:22cv49.

5 THE COURT: Is the plaintiff ready?

6 MS. ECKSTEIN: We are, Your Honor.

7 THE COURT: Is the defendant ready?

8 MR. MORAN: Yes, your Honor.

9 THE COURT: All right. We're here today on
10 plaintiffs' motion on why defendant Joshua Mast and also
11 Jonathan Mast should not be held in contempt for violating
12 the court's protective order requiring use of pseudonyms for
13 plaintiffs and the otherwise limited disclosure of their
14 identifying information.

15 The court has considered the parties' prehearing
16 filings and thanks the parties for those submissions. I
17 would get into argument. I would like to hear, first, if
18 there is any evidence, but I'm interested in what evidence
19 and basis is there to support the continued imposition of the
20 protective order in the case today as opposed to when it was
21 first entered, and what real risks remain present to
22 plaintiffs, as well as to innocent third parties, were
23 plaintiffs' identifying information to be disclosed, and how
24 does a protective order mitigate those risks?

25 Second, have plaintiffs or any innocent third

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 parties been harmed or subjected to increased risk of harm on
2 account of the asserted violation of the protective order by
3 the defendants allegedly trying to circumvent the protective
4 order?

5 Third, the manner of disclosure of Baby Doe's
6 likeness appears to be a central underlying violation of the
7 protective order. As she has gotten older, wouldn't any risk
8 of harm of identifying her diminish because it would be less
9 likely anyone would be able to identify the plaintiffs'
10 families based on her likeness today as opposed to when she
11 was first found in Afghanistan.

12 Finally, fourth, what legitimate reason could the
13 defendants, and Joshua Mast especially, have in identifying
14 plaintiffs specifically by name that would outweigh any
15 accompanying risk of harm to their families in Afghanistan?

16 With that in mind, plaintiffs may proceed. Do you
17 anticipate you calling any witnesses?

18 MS. ECKSTEIN: We do not anticipate calling any
19 witnesses.

20 THE COURT: Does the defendant plan on calling any
21 witnesses?

22 MR. MORAN: Your Honor, Joshua Mast and Jonathan
23 Mast are here. We won't call them unless the Court expresses
24 an interest in hearing from them.

25 THE COURT: Okay. Well, we'll proceed on

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 plaintiffs' motion.

2 MS. ECKSTEIN: If I could have a moment, Your Honor,
3 just to hook up a PowerPoint.

4 THE COURT: Okay. I understand some counsel may be
5 listening in on Zoom. This is a court proceeding, and under
6 the rules of the court in the Western District of Virginia
7 and elsewhere, I think, recording and broadcasting court
8 proceedings is not permitted, so no attorney or any other
9 person may record or broadcast these proceedings.

10 MS. ECKSTEIN: Thank you, your Honor. So we're here
11 on our second motion to show cause regarding Joshua Mast and
12 also seek to hold his brother, Jonathan Mast, in contempt as
13 an aider and abettor.

14 As you noted, the parties have filed prehearing
15 briefs. In ours we set forth on evidentiary basis for the
16 motion, and we believe that based on the evidence submitted
17 in those briefs, you have enough evidence before you now to
18 hold both Joshua and Jonathan in contempt.

19 It's my understanding from Mr. Moran that he doesn't
20 object to the admission of any of the items that we
21 identified in our prehearing brief into evidence, so I have
22 those here for you.

23 Does it make sense to submit them to the Court?
24 It's exhibits A through R to our prehearing brief. There is
25 also Joshua Mast's declaration, which was actually submitted

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 to the Court at docket 239-1. There is Ms. Disarro's
2 declaration from the Pipe Hitter Foundation, that was ECF
3 number 257-2. Then we also have on thumb drives a copy of
4 the One America News Network interview that Jonathan Mast did
5 in which some identifying photographs were presented.

6 THE COURT: That doesn't require us to take all
7 those notebooks, does it?

8 MS. ECKSTEIN: Only one of each, or as many as you
9 want, I should say.

10 THE COURT: Well, I mean, we don't want a lot of --
11 you know, we don't keep a lot of records like that, if we can
12 avoid it. But everything that's necessary that, you know,
13 there is an exhibit of, anything that you're going to rely
14 upon ought to be -- any document needs to be filed, I think.

15 MS. ECKSTEIN: Yes. So we have one copy for you,
16 one copy for the law clerk, one copy for the deputy, and we
17 also have a copy for Mr. Moran. Does that make sense?

18 THE COURT: Yes.

19 MS. ECKSTEIN: My apologies, Judge. So you should
20 have in front of you a binder that has Exhibits A through R
21 to our prehearing brief. You should also have Joshua Mast's
22 declaration, you should have Dena Disarro's declaration, and
23 you should have a thumb drive.

24 THE COURT: I do.

25 MS. ECKSTEIN: Great.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 MR. MORAN: Your Honor, if I may briefly again, on
2 the representation of counsel that these are the same
3 exhibits submitted in support of the motion, we don't object
4 to their consideration for purposes of the motion.

5 For example, we're not raising a hearsay objection.
6 If they were to later be admitted for another purpose, we
7 would reserve the right to raise that objection.

8 THE COURT: All right. Thank you.

9 MS. ECKSTEIN: So, Your Honor, in his prehearing
10 brief Joshua Mast made four arguments in opposition to our
11 requests that he and his brother Jonathan be held in
12 contempt.

13 The first is that the protective order is not valid,
14 as you suggested earlier that we need to address. Number
15 two, that Joshua Mast did not knowingly violate the
16 protective order. Number three, that he took all reasonable
17 steps to comply with the protective order. And number four,
18 that the Does, the plaintiffs, have not suffered any harm as
19 a result of this violation of the protective order. I'd like
20 to address each of those arguments in turn.

21 With respect to your questions about the protective
22 order, my colleague, Kevin Elliker, is prepared to address
23 the issue of the protective order, whether it's still valid,
24 whether it's still necessary, which I think is a little bit
25 of a different question than whether it's valid.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 The protective order was certainly valid at the time
2 that you entered it, and it was valid at the time that the
3 violations occurred. Whether it continues to be necessary I
4 think is a different question, and, as I mentioned, my
5 college, Mr. Elliker, is prepared to address it.

6 We can move straight into the evidence now and then
7 have him address that or the other way around, whatever you
8 prefer.

9 THE COURT: Just go on into the evidence.

10 MS. ECKSTEIN: Okay. Great. With respect to
11 Mr. Mast's assertion that he did not violate the protective
12 order, his argument in the prehearing brief at least rests
13 solely on his ascertain that Jonathan Mast should be believed
14 when he says he wasn't representing Joshua Mast in working
15 with the Pipe Hitter Foundation.

16 The evidence, though, Your Honor, shows otherwise,
17 and there are 14 key facts. There are 14 of them, and they
18 won't take that much time, but I'll run through these.

19 The first key fact, Your Honor, is that Joshua Mast,
20 he initiated the discussions with the Pipe Hitter Foundation,
21 and we know that from his own declaration, Joshua Mast's
22 declaration, in which he states that he inquired with the
23 Pipe Hitter Foundation about a grant to address the
24 significant expenses resulting from this lawsuit as well as
25 others.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 Fact number two: Joshua Mast provided the Pipe
2 Hitter Foundation with background information on this lawsuit
3 and a link to a Google photo album that included hundreds of
4 identifying photographs of Baby Doe. And when I say
5 identifying photographs, I'm referring to photographs that
6 show her face, that make it clear this is who this child is.

7 And, again, we know that from -- well, first of all,
8 Exhibit R to our prehearing brief, that's an email from
9 Joshua Mast to the Pipe Hitter Foundation. It includes that
10 background information, and it includes the link to the
11 Google photo album. The Google photo album itself is Exhibit
12 L to be our brief.

13 Fact number three: Joshua Mast told the Pipe Hitter
14 Foundation that he could not work with it in a public-facing
15 capacity because of the Court's protective order. Again, we
16 know that from his own declaration where he states, "When I
17 inquired with the Pipe Hitter Foundation about a grant, I
18 explained to it that due to the Court's gag order," and
19 that's how they refer to it is a gag order rather than a
20 protective order.

21 "Due to the Court's gag order and its restrictions
22 on identifying Baby Doe in this suit, we were essentially
23 unable to defend ourselves or have others do so on our
24 account." So Joshua Mast recognized he couldn't have
25 somebody do this on his account to act as a proxy for him.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 In addition, we have the statements from
2 Ms. Disarro's declaration. Ms. Disarro is the executive
3 director of a Pipe Hitter Foundation, and she submitted a 115
4 paragraph declaration that detailed the communications step
5 by step with her and Joshua Mast and with her and Jonathan
6 Mast. She states, "I was told about a gag order by Joshua
7 Mast during a telephone call that occurred in March of 2023."

8 She also testified in her declaration that Joshua
9 Mast told her that neither he nor his wife would be permitted
10 to speak publicly about the case or Baby Doe, and it would
11 prevent them from serving in a public-facing capacity.

12 Fact number four: Joshua Mast suggested instead
13 that Jonathan Mast, his brother, act in that public-facing
14 capacity. And we know that first by Ms. Disarro's
15 declaration where she explicitly says he believed, meaning
16 Joshua Mast, believed his brother, Jonathan Mast, could serve
17 in a public-facing capacity to talk about the Mast case, and
18 we know that he did, in fact, do that. His interview on the
19 One America News Network is one such example.

20 Fact number five: Joshua Mast put Jonathan Mast in
21 touch with the Pipe Hitter Foundation in April of 2023, and
22 we know that in large part because of Jonathan Mast and his
23 testimony at his deposition. He was specifically asked,
24 "Joshua said you were going to be contacted by somebody from
25 the Pipe Hitter Foundation, right?" "Yes."

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 Fact number six: Jonathan Mast himself was familiar
2 with the court's protective order even before he began
3 communicating with the Pipe Hitter Foundation. And how do we
4 know that? Again, we know that because of Jonathan Mast's
5 own testimony when he testified -- when he was asked, "So
6 when is the first time you heard Joshua talk about a
7 protective order?" At first he said, "I don't know." Then
8 he's asked, "Was it before or after this call you had from
9 him," meaning Joshua Mast, "that he was going to hear from
10 the Pipe Hitter Foundation." And Jonathan Mast answers, "The
11 first time that I heard about it was" -- "Was it before the
12 call?" "Probably before, yes."

13 In addition, he also testified that he has seen the
14 protective order, and -- this is Jonathan Mast -- and he
15 understood the purpose of Judge Moon's protective order was
16 to protect the identity of John Doe, Jane Doe, and Baby Doe.

17 Fact number seven: Jonathan Mast himself sent the
18 Pipe Hitter Foundation a link to that same Google photo album
19 with hundreds of identifying photographs as well as
20 additional photographs that he sent via an email, including
21 additional photographs of Baby Doe that identified her.

22 Again, we know this from Jonathan Mast's deposition
23 where he confirmed that he sent a link for the Google photo
24 album to the Pipe Hitter Foundation, and he testified that he
25 understood that the Pipe Hitter Foundation was going to use

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 those photos in support of a fundraising campaign.

2 Exhibit L to our prehearing brief and that's been
3 submitted to the Court is a printout of the Google photo
4 album with the hundreds of photographs that identify Baby
5 Doe. Exhibit J is the email from Jonathan Mast to the Pipe
6 Hitter Foundation that attaches or provides additional
7 identifying photographs of Baby Doe.

8 Fact number eight: Joshua Mast knew that Jonathan
9 Mast was working with the Pipe Hitter Foundation, and we know
10 that for a couple of reasons.

11 One, Joshua Mast himself in his declaration admits
12 that he learned, he says as late as February or early March
13 of 2023, that my brother, Jonathan Mast, had coordinated with
14 them, so he already had coordinated with the Pipe Hitter
15 Foundation to raise money for our expenses.

16 Now, I think his timing is a little bit off here
17 because the evidence shows that Ms. Disarro's first text with
18 Jonathan Mast appears to be in April of 2023, but regardless,
19 Joshua Mast admits that he was aware early in the process
20 that his brother had partnered with the Pipe Hitter
21 Foundation, and Jonathan Mast in the his deposition confirmed
22 this.

23 He was asked, "During this time frame, April and May
24 of 2023, Joshua knew you were in touch with Pipe Hitter
25 Foundation, correct?" "Yes, I had told him I had decided to

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 touch base with them and partner with them."

2 Fact number nine: Even though Joshua Mast had put
3 the Pipe Hitter Foundation in contact with his brother,
4 Jonathan Mast, nonetheless, the Pipe Hitter Foundation
5 continued to communicate with Joshua Mast about the
6 fundraising campaign, including by sending Joshua Mast a copy
7 of the grant agreement for his signature.

8 Ms. Disarro in her declaration states that she
9 continued operating with the understanding that she could
10 speak with Joshua about the public awareness and legal
11 defense grant fundraising campaign privately, but that
12 Jonathan Mast would need to serve in the public-facing
13 capacity. She further states that Joshua Mast was provided
14 with our standard legal defense agreement.

15 Fact number ten: Joshua Mast told the Pipe Hitter
16 Foundation that he could not sign the grant agreement, but
17 that Jonathan Mast could do so instead. And Ms. Disarro
18 explains that Joshua Mast told her he couldn't signed it
19 because of the Court's protective order, the so-called gag
20 order. And he told Ms. Disarro to speak with Jonathan
21 instead about signing that agreement.

22 Fact number 11: Jonathan Mast then signed the Pipe
23 Hitter Foundation grant agreement on Joshua Mast's behalf.
24 Exhibit K to our prehearing brief and that's now been
25 submitted to the Court is a copy of that grant agreement, and

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 it has Jonathan Mast's signature on it. The grant agreement
2 states that the Pipe Hitter Foundation "is implementing a
3 fundraising campaign in support of Joshua Mast and his
4 family," and then defines Joshua Mast and his family as
5 grantees.

6 Then it states that the purpose of the funds raised
7 are to provide grantees' financial support for legal defense
8 and specifically refers to the legal fees of Joshua Mast.
9 And Jonathan Mast confirmed, he acknowledged that the purpose
10 of the grant agreement was to enable the Pipe Hitter
11 Foundation to provide financial assistance to his brother
12 Joshua.

13 Fact number 12: As a result of the grant agreement,
14 the Pipe Hitter Foundation transferred \$5,000 to Jonathan
15 Mast. He then transferred \$4,000 of those dollars to Joshua
16 Mast and kept \$1,000 for himself because he had already given
17 his brother Joshua a \$1,000 loan. So in effect the entire
18 \$5,000 from the Pipe Hitter Foundation went to Joshua Mast.

19 Fact number 13: In May and June of 2023, the Pipe
20 Hitter Foundation published information about this litigation
21 along with identifying photographs of Baby Doe, at least
22 three of which appear to have come from the Google photo
23 album, the link that was provided by both Joshua and Jonathan
24 Mast to the Pipe Hitter Foundation, and the Pipe Hitter
25 Foundation published this information on its website and

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 related social media accounts with hundreds of thousands of
2 followers.

3 Exhibit A to our prehearing brief and submitted to
4 the Court today are the screen shots from the Pipe Hitter
5 Foundation website. And as I mentioned, Exhibit L is the
6 Google photo album.

7 If you look at Exhibit A, I can tie the specific
8 photographs to the Google photo album, as well as Exhibit J,
9 which is the email that Jonathan Mast sent to the Pipe Hitter
10 Foundation with additional photographs.

11 For example, on Exhibit A on page 1, there is a
12 photo of Joshua Mast holding Baby Doe, and she's wearing a
13 purple shirt. You will find that on Exhibit L, the Google
14 photo album, page 1, and you will also find it in Exhibit J
15 at the page that's Bates labeled PHF-39.

16 On page 2 of Exhibit A there is a photo of Stephanie
17 Mast with Baby Doe. You can find that in Exhibit L, the
18 Google photo album, on page 9. You can also find that at
19 Exhibit J, the email from Jonathan Mast, at the page Bates
20 labeled PHF-39.

21 Back to Exhibit A, on page 3 there is another
22 photograph of Baby Doe with a white blanket. You can find
23 that in the Google photo album, Exhibit L, at page 3.

24 Then on page 8 of Exhibit A you will see a photo of
25 Baby Doe in which she's older. It seems to be a more recent

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 photograph. She's standing on some exercise equipment. That
2 appeared on Eddie Gallagher's Instagram account. Eddie
3 Gallagher is the founder of the Pipe Hitter Foundation. And
4 you will find that in Exhibit J, the email from Jonathan Mast
5 to the Pipe Hitter Foundation, at the page that's Bates
6 labeled PHF-45.

7 The last fact, fact number 14: On June 6 of 2023
8 Jonathan Mast solicited donations for the Pipe Hitter
9 Foundation legal defense fund for Joshua Mast for this
10 litigation through an interview on the One America News
11 Network, which itself published identifying photographs of
12 Baby Doe that Jonathan Mast provided to it.

13 The thumb drive that I've submitted to the Court has
14 a recording of that interview, and there are a number of
15 photos there, four photos, that appear of Baby Doe. At
16 minute 1:01 there is Baby Doe. She's in a red onesie. You
17 can find that in Exhibit L, the Google photo album, on page
18 3.

19 At 1:08 and 3:25 of the interview you'll see the
20 same photo of Joshua Mast holding Baby Doe who is wearing a
21 purple shirt. You'll find than in Exhibit L, the Google
22 photo album, at page 1, and Exhibit J, Jonathan Mast's email,
23 at PHF-39. Then at 2:43 of the interview you'll see the
24 photo of Baby Doe with the white blanket, and that, again, is
25 on Exhibit L, the Google photo album, at page 3.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 Jonathan Mast testified at his deposition that he
2 gave the One America News Network those photographs, and he
3 even gave them a link to the Google photo album.

4 So, Your Honor, based on these facts, we believe you
5 have sufficient facts in front of you to establish that a
6 violation of the protective order, several violations of the
7 protective order occurred.

8 We have separately for you -- this is a
9 demonstrative. It's a timeline of the events that tries to
10 consolidate all of this. It doesn't repeat what you've seen,
11 but it basically puts it in a timeline format.

12 These facts that I've gone through now here are
13 undisputed, and they establish Joshua Mast's violations of
14 the protective order as well as those of Jonathan Mast as an
15 aider and abettor. They meet the requirements for a finding
16 of civil contempt.

17 I would add there is likely more evidence that we
18 don't have. We know that Joshua Mast communicated with Dena
19 Disarro of the Pipe Hitter Foundation using the Signal
20 messaging application, and we know that he set his Signal
21 messages application, the messages with Ms. Disarro, to auto
22 delete. This is during the middle of this case, of this
23 litigation, that he sets his communications about this
24 litigation to auto delete.

25 So as a result there are likely additional

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 communications between Joshua Mast and Ms. Disarro that we
2 simply don't have. Ms. Disarro states as much in her
3 declaration. Nonetheless, the facts that we have already
4 addressed we believe are sufficient for a finding of
5 contempt.

6 I want to briefly touch on the issue of harm.
7 Mr. Elliker will address the questions that you raised, but I
8 want to address it in a different context.

9 THE COURT: Okay.

10 MS. ECKSTEIN: Number one, with respect to harm,
11 Joshua Mast argues that the Does have not suffered any harm
12 apparently because they can't point to anyone in Afghanistan
13 who identified them through the Pipe Hitter Foundation's
14 postings.

15 This is the same argument that was made when we were
16 here on our first show cause motion regarding the CBS
17 interviews that were broadcast, and as we noted then, actual
18 harm is not a requirement. That's from the Desimone case,
19 Roe v. General Motors, and additional cases cited in our
20 brief.

21 Frankly, it would be nonsensical to require actual
22 harm here that would confound the very purpose of the Court's
23 protective order. The protective order is intended to
24 protect the plaintiffs and innocence nonparties in
25 Afghanistan.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 It should not take an innocent nonparty in
2 Afghanistan actually being harmed to have a protective order
3 violation. That should not excuse Joshua Mast and Jonathan
4 Mast's conduct here.

5 Not only that, we raised -- we identified several
6 other harms that have resulted from these violations of the
7 protective order that the Joshua Mast prehearing brief does
8 not address at all. It completely ignores them.

9 Those are the harms by the increased risk to
10 innocent nonparties in Afghanistan, the harm by the delay in
11 court proceedings and expenditure of resources. As you know,
12 this is our second motion to show cause. We've expended
13 considerable sums on this motion as well as the last one.

14 We took the deposition of Jonathan Mast for this
15 one. We subpoenaed documents from Jonathan Mast and the Pipe
16 Hitter Foundation with respect to this show cause motion. We
17 had motion practice with the Pipe Hitter Foundation. We
18 would much prefer to be focusing our attention on the heart
19 of this case rather than on these side issues.

20 In addition, there is harm to the judicial system
21 itself requiring this court to spend unnecessary resources
22 dealing with these issues. So harm is present even if there
23 is not actual harm to the plaintiffs themselves.

24 Now, a defense, of course, to civil contempt when
25 all four elements of contempt are found is if the alleged

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 contemptor took all reasonable steps. Joshua Mast continues
2 to invoke what I refer to as the head in the sand defense.
3 He says, I didn't ask or direct Jonathan Mast to talk to
4 anybody, including the Pipe Hitter Foundation, on my behalf.
5 I didn't do that.

6 Courts have rejected this defense of willful
7 ignorance, and we've cited several such cases on pages 25 and
8 26 of our prehearing brief. We think this Court should
9 reject it here as well.

10 Let's remember that willfulness is not a requirement
11 of a finding of civil contempt. We know that from the
12 Supreme Court's decision in McComb v. Jacksonville in which
13 the Court was very clear stating, "Since the purpose of civil
14 contempt is remedial, it matters not with what intent the
15 defendant did the prohibited act." The Court went on, "An
16 act does not cease to be in violation of a decree merely
17 because it may have been done innocently."

18 Now, we don't think this was done innocently here.
19 Even if intent was required -- it's not, but even if it was,
20 as we believe exists here, the evidence establishes that
21 Joshua Mast knew exactly what he was doing when he asked
22 Jonathan Mast to speak with the Pipe Hitter Foundation.

23 Joshua Mast asked Jonathan Mast to speak to the Pipe
24 Hitter Foundation on his behalf. After Joshua Mast asked
25 Jonathan Mast to interface with the Pipe Hitter Foundation,

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 Jonathan signed the grant agreement on Joshua's behalf. And
2 when the Pipe Hitter Foundation sent funds to Jonathan Mast
3 pursuant to the grant agreement, he gave that money,
4 forwarded that money to Joshua Mast.

5 Not only that, let's not forget that Joshua Mast
6 himself sent the Pipe Hitter Foundation a link to the Google
7 photo album that contains hundreds of photographs with Baby
8 Doe's face clearly showing, clearly identifying her. And he
9 continued to interact with the Pipe Hitter Foundation long
10 after he supposedly ceded that responsibility to Jonathan
11 Mast and after he knew that Jonathan Mast had partnered with
12 the Pipe Hitter Foundation.

13 So what could Joshua Mast have done differently?
14 There is a lot that he could have done differently. We
15 identified in our prehearing brief a number of reasonable
16 steps he could have taken. He did not respond to this, by
17 the way.

18 Well, I should say that he did say in the prehearing
19 brief that he acted in good faith, but what's required by the
20 case law is not just some general notion of good faith. It's
21 a demonstration by the contemtor of having made in good
22 faith all reasonable efforts to comply, and that's where we
23 think he certainly has failed. He did not make reasonable
24 efforts to comply.

25 What could he have done? He could have given the

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 Pipe Hitter Foundation a copy of the protective order. He
2 talked about the protective order with the Pipe Hitter
3 Foundation. Just send them a copy. He didn't do that.

4 He could have not sent the Pipe Hitter Foundation a
5 link to the Google photo album with the identifying
6 photographs of Baby Doe, providing only nonidentifying
7 photographs. He could have directed his brother Jonathan not
8 to do that as well.

9 He could have directed the Pipe Hitter Foundation
10 itself, do not use any identifying photographs of Baby Doe.
11 And after the Pipe Hitter Foundation published her
12 identifying photographs, he could have directed it to remove
13 them, but he didn't. Joshua Mast does not dispute he did
14 none of these things.

15 So, Your Honor, we believe the Court has broad
16 discretion here to fashion an appropriate remedy for civil
17 contempt. I don't think we're asking for a lot. We're
18 asking for a finding of contempt and an award of attorneys'
19 fees. An award of fees is appropriate even without a finding
20 of willful disobedience, although I think it certainly exists
21 here. We ask that the Court find Joshua and Jonathan Mast in
22 contempt.

23 In closing, Your Honor, it should be clear to the
24 Court that Joshua Mast is an individual who does not like to
25 follow court orders and rules. In the Baby Doe litigation

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 previously before this Court, you ruled that the custody
2 order he had obtained was substantially likely to be invalid
3 because the federal government's foreign policy decision, yet
4 after that order, he continued to pursue Baby Doe's adoption.
5 And his counsel, his other brother Richard Mast, didn't even
6 mention to you the interim adoption order he had in hand when
7 you directly asked about adoption.

8 Again, Joshua Mast moved to stay discovery in this
9 case pending a ruling on his motion to dismiss. Judge Hoppe
10 denied that motion back in October of 2023, but Joshua Mast
11 nonetheless still did not produce any documents in response
12 to our first request for production, which had been pending
13 since December of 2022, until he was ordered to do so in
14 response to the motion to compel that we filed, and Judge
15 Hoppe ordered that production. That was on November 28,
16 2023.

17 But even then he still did not comply with that
18 order which required us to file a motion for sanctions.
19 Judge Hoppe heard that motion on May 2nd. Since then,
20 unfortunately, we've had to file yet another motion regarding
21 his failure to properly respond to requests for admission.
22 That motion is before Judge Hoppe. Then, of course, we have
23 the protective order violations themselves, the first one
24 with CBS, and now this one with the Pipe Hitter Foundation.

25 Now, maybe because of the experience that he had

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 with respect to the CBS motion to show cause, this time
2 Joshua Mast essentially went into the shadows in search of
3 plausible deniability. He decided to use his brother
4 Jonathan as a proxy.

5 Each of these decisions by Joshua Mast has required
6 plaintiffs and the Court to spend a considerable amount of
7 time addressing everything except the heart of the case.

8 This motion practice easily could have been avoided
9 had Joshua Mast merely taken a few reasonable steps, but he
10 didn't, so we're here once again taking up the Court's time
11 on something other than the substance of the case itself.

12 Contempt sanctions are designed to coerce a
13 reluctant party to obey a Court's directive. Respectfully,
14 Your Honor, we need to put an end to this conduct. We ask
15 that the Court find Joshua Mast and Jonathan Mast in contempt
16 and award plaintiffs their attorneys' fees.

17 Should I turn it over to Mr. Elliker to address --

18 THE COURT: Yes, please.

19 MR. ELLIKER: Good morning, Your Honor. My name is
20 Kevin Elliker. I'm here on behalf of the plaintiffs.

21 As Ms. Eckstein explained, Your Honor, there is, I
22 think, an important distinction between the questions that
23 Your Honor asked about that you have particular concerns
24 about that I want to make sure I address and the element that
25 has to be satisfied in plaintiffs' view to make a finding of

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 civil contempt.

2 That distinction is, on the one hand, whether there
3 was a valid order at the time of the conduct at issue.
4 That's what -- I'll address that issue first. The second
5 issue that the Court's questions went to are more about the
6 ongoing need for the protective order going forward.

7 I first want to start by explaining why I think
8 there really should be little debate that the Court's
9 protective order is valid and certainly was valid when
10 entered and was valid at the time of the conduct at issue
11 here.

12 The use of pseudonyms in litigation in the Fourth
13 Circuit is guided by the Fourth Circuit's 1993 decision in
14 James v. Jacobson. In that case, the Court cited several
15 factors where the Court advised district courts to consider,
16 among them whether the request for pseudonymity is based on
17 avoiding mere annoyance or inconvenience versus preserving
18 privacy in a matter that's a sensitive or highly personal
19 nature.

20 The second factor is whether identification poses a
21 risk of retaliatory physical or mental harm, or even
22 critically to innocent non-parties. The third factor is the
23 ages of the persons whose privacy interests are sought to be
24 protected. Fourth, whether the action is against the
25 government or private party. Fifth, whether the risk of

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 unfairness to the opposing party from allowing the action
2 against it, what is the risk of unfairness to the opposing
3 party of allowing that?

4 James is still the law of the Fourth Circuit. It
5 was cited not three months ago in a published decision, Doe
6 v. Sidar, which is 93 F.4th 241. It's a February 2024
7 decision citing those five factors and going through and
8 reversing a district court's determination to remove
9 anonymity protections as an abuse of discretion. Just a few
10 months before that another decision from the Fourth Circuit,
11 Doe v. Doe, 85 F.4th 206. That's from October of 2023.

12 In that decision the court acknowledges that there
13 is a First Amendment right of public access and openness in
14 judicial proceedings, and yet these factors can be
15 considered, and the Court in its discretion can allow parties
16 to proceed under pseudonyms.

17 I think that the additional components of the
18 protective order here are necessary carryons to allowing the
19 plaintiffs to proceed via pseudonym. It is cold comfort to
20 allow their names to remain pseudonymous on the caption if
21 there is not additional protections that have to go into
22 protecting that information during the course of discovery
23 and litigation.

24 Most importantly, Your Honor, as you know, you
25 relied on the James case and cited it and made factual

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 findings in the protective order showing that the plaintiffs
2 had established grounds to proceed by pseudonym and for the
3 entry of the protective order, and those are laid out in some
4 detail in the protective order.

5 On all of this, Your Honor, the Masts do not argue
6 that a party can never proceed by pseudonym. They do not
7 argue that restrictions like the ones in the protective order
8 can never be put in place. They don't argue that the Court
9 relied on the wrong law or that it's bad law or that it
10 relied on the wrong factors.

11 They don't make any of those arguments because they
12 can't. Really what their argument is is they disagree with
13 the Court's decision to exercise its discretion in the way
14 that it did and enter the protective order. That is not an
15 argument as to the legal validity of the order.

16 They've obviously filed a motion to have that
17 protective order modified. In fact, the very first argument
18 in their prehearing brief, argument one, is that the Court
19 should lift the protective order, which I know does not go
20 towards the question of whether it was a valid order when it
21 was violated.

22 We contest the arguments that they make, and I'll
23 address those in a moment, but I think it just bears emphasis
24 that the point, for purposes of finding contempt, is not
25 whether they think the order should be in place today. It's

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 whether the order was valid when it was violated last year.

2 Now, the primary argument that they do make as to
3 validity arises under the First Amendment. They repeatedly
4 refer to the Court's protective order as a gag order. They
5 cite exactly zero cases, Your Honor, where the granting of
6 pseudonymity protections have been deemed an unconstitutional
7 gag order.

8 The case they rely on in principle is the
9 *Murphy-Brown* case, which our firm knows a fair amount about
10 that case, Your Honor, because we're the party that won --
11 we're the lawyers who won that case for *Murphy-Brown* at the
12 Fourth Circuit on mandamus having that particular order
13 thrown out as a gag order.

14 The circumstances of that case could not be more
15 different. That was a mid-trial order from the trial judge
16 ordering that the parties could not disclose information that
17 could be prejudicial to the proceedings during the course of
18 trial. It was a blanket prohibition against all parties. It
19 was a true gag order. That was what Judge Wilkinson in the
20 *Murphy-Brown* decision walked through and explained the First
21 Amendment implications for that.

22 The Fourth Circuit in its many, many decisions
23 citing *James v. Jacobson* doesn't cite any gag order cases.
24 So I think what that indicates is that the First Amendment
25 construct for a gag order like *Murphy-Brown* stands apart from

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 the question of whether a party can proceed via pseudonym.

2 Now, most importantly, Your Honor, their selective
3 quotation of the protective order where they say it's a gag
4 order makes it seem like the Court said you can't talk about
5 anything having to do with the case, right? That you can't
6 come out and raise money; you can't give an interview to news
7 networks. That's not what the protective order says.

8 What the protective order says is that they're
9 prohibited from disclosing identifying information. There is
10 an important word, "unless." It doesn't prohibit the
11 disclosure of identifying information. It prohibits that
12 disclosure unless the person who receives the information
13 also executes a nondisclosure agreement that's subject to the
14 contempt power of this court. So it's not a true gag order,
15 as they say.

16 Again, I think, Your Honor, that their argument
17 betrays that they really actually don't argue that it's
18 unconstitutional because they disagree with it only as to the
19 plaintiffs. They actually don't raise an issue as to
20 maintaining the confidentiality as to the child.

21 So they don't seriously contest that there are
22 interests identified by the Court here that would support the
23 entry of a protective order. It means that their argument is
24 not based on legal principles, legal validity. It's about
25 the factual underpinning, and they simply disagree.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 Now, on that particular point, Your Honor -- so I'll
2 stop there and say that I think everything I have just said
3 is sufficient to show the first element that has to be proven
4 to find Joshua and Jonathan Mast in civil contempt. There
5 was a valid order. It was valid when it was entered, and it
6 was valid in 2023.

7 Even if -- not if. We know that they disagree with
8 the entry of the order. We know that they filed a motion
9 with the court to modify the order. We know that they want
10 it lifted. We understand all of that stuff.

11 None of that, though, gives license to go ahead and
12 act as though it isn't in place or to engage in a form of
13 self-help to essentially tee up -- I'm not suggesting that
14 this was a long plan, but to wait until this boomerangs back,
15 and now we're going to take down a protective order on a
16 First Amendment argument or to say that the facts as they
17 stand now show that it shouldn't exist; therefore, we'll
18 retroactively forgive a violation in the past. I think none
19 of that passes muster.

20 In terms of the protective order as it stands today,
21 Your Honor, I think that what I can say is the Masts have
22 made much of discreet pieces of information that they say in
23 small ways show that someone or some people or some
24 individuals might have the ability to identify the plaintiffs
25 in this litigation.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 I don't think that that is sufficient to show that
2 the protective order should not be in place because there is
3 a difference between individuals being able to put together
4 pieces of information on their own through their own
5 ingenuity, whether it's media outlets or investigators or
6 whoever it may be, to on their own go and try to find the
7 pieces of information. It's another thing to open up the
8 court's docket to allow that information to be spilled out
9 into the public where it's inevitable that anyone could grab
10 that information and take it with them.

11 I also think it's important that innocent parties
12 still remain in Afghanistan. Of course, as has been written
13 about I think in the papers, Your Honor, the plaintiffs have
14 been granted asylum. That reenforces, I think, the view that
15 they have a well-founded fear of what would happen to them if
16 they went back to Afghanistan.

17 It stands to reason, Your Honor, that if they are
18 then publicly identified in the court's docket making it easy
19 to identify their family members back in Afghanistan, that
20 risk propounds onto them, onto the family members there.
21 Certainly, I think among all protective order cases this one
22 stands apart in terms of the kind of harm we're talking about
23 here with innocent folks who are back in Afghanistan.

24 Ms. Eckstein discussed the harms. I think Your
25 Honor asked about the disclosure of the child's likeness

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 given her aging and whether she looks today like she did when
2 folks who may be able to identify her and associate her with
3 a particular family or relatives.

4 I would say that I think it would be difficult to --
5 first of all, I would say the plaintiffs don't object
6 themselves to maintaining confidentiality as to the child.
7 Whether they would say that we only want that as to her name,
8 and we would be fine with having photographs put out there
9 with her, I think it's unclear how we would decide whether
10 someone's likeness starts to make them look like someone from
11 a family somewhere else in the world.

12 Certainly, I know just the other day I was showing
13 Mr. Powell a photograph of my daughter, and he said, "Gosh,
14 that looks just like your wife." So I think to lift the
15 protective order as to the likeness of the child based on the
16 supposition that she doesn't look now like she did then
17 overlooks that she could still be identified by folks back in
18 Afghanistan and create that risk to innocent parties.

19 Your Honor, I think that addresses the questions
20 that the Court identified. Thank you. I appreciate your
21 time.

22 THE COURT: Okay. Mr. Moran.

23 MS. ECKSTEIN: Real quick, two housekeeping things.

24 THE COURT: Yes.

25 MS. ECKSTEIN: I just wanted to make sure the Court

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 was aware that Jonathan Mast is here with his counsel.

2 THE COURT: Okay.

3 MS. ECKSTEIN: I wanted to make sure the Court was
4 aware. Then, separately, I do have the PowerPoints in
5 binders if you would like a copy, if I could submit them to
6 the Court.

7 THE COURT: All right.

8 MR. MORAN: Thank you, Your Honor. John Moran for
9 defendants Joshua and Stephanie Mast.

10 As Ms. Eckstein said, Mr. Jonathan Mast and his
11 counsel are here. We do not represent him. If the Court
12 wishes to hear from them, we certainly have no objection.

13 With the Court's indulgence, I'd like to address
14 three things. First, the actual sanctions motion that's here
15 before us today; number two, the question that the Court has
16 raised about the ongoing need for the protective order; then
17 third, to briefly address some of the related points that
18 Mr. Elliker raised about the protective order.

19 First, we think the most -- we've set forth our
20 arguments in the briefing, including the prehearing brief.
21 We think the simplest way for the Court to resolve this case
22 is to hold the plaintiffs have not met their burden of
23 showing by clear and convincing evidence either that there
24 was a knowing violation of the protective order or that the
25 movants have suffered harm as a result. That is their burden

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 under Ashcraft and Fourth Circuit precedent.

2 In particular, on the showing of harm, that goes
3 very closely to the questions that the Court has raised about
4 the ongoing need for the protective order. Now, I agree with
5 Mr. Elliker that there are two separate questions of whether
6 there is a need for the protective order on an ongoing basis
7 and whether the protective order was valid when it was issued
8 and at the time of the conduct that's the issue of this
9 hearing.

10 We've set forth our arguments as to why we don't
11 think the order is valid, but, again, our argument here is
12 not self-help, as Mr. Elliker insinuated. The point here was
13 not that Joshua Mast believed that he was free to ignore the
14 protective order because he didn't like it or because he had
15 challenged it. In fact, clearly the record shows that he
16 changed his conduct in order to ensure that he was complying
17 with the protective order, at least as he understood it, and
18 we know --

19 THE COURT: Well, he changed it to reach the same
20 result. I mean, he changed just that someone else did what
21 he was trying to achieve.

22 MR. MORAN: Well, again, Your Honor, we think the
23 record is clear that what he was trying to achieve was to
24 receive financial help to support him in defending this
25 litigation.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 THE COURT: I know, but he was trying not to -- for
2 him not to violate the protective order, rather he was having
3 someone else do it for him.

4 MR. MORAN: Well, again, Your Honor, the record
5 shows he knew that his family, his brother included, were
6 supportive of him and his family, and they wanted them to get
7 this help as well.

8 THE COURT: Well, the question is was it aiding and
9 abetting by Jonathan of Joshua and vice versa.

10 MR. MORAN: Understood, Your Honor. We believe that
11 both their testimony and the declaration on which the
12 plaintiffs rely are clear that Joshua initially spoke to the
13 Pipe Hitters Foundation. Again, I'm --

14 THE COURT: I don't know if you do any criminal law,
15 but have you ever been in a conspiracy case in a criminal
16 case?

17 MR. MORAN: Yes, your Honor, I'm very familiar with
18 it.

19 THE COURT: I mean, if you were to raise this kind
20 of motion at the close of the government's evidence and say
21 there was not evidence of a conspiracy, I think you'd be
22 laughed out of court.

23 MR. MORAN: Well, again, Your Honor, I think the
24 question would be what is the common goal of the conspiracy?
25 What plaintiffs want to insinuate is that the goal of the

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 conspiracy was to circumvent the protective order by getting
2 pictures of our client's child out into public view. I would
3 respectfully submit that if that was the goal, then this was
4 a very round about way to do it.

5 THE COURT: Well, I can't imagine people with a law
6 degree thinking they can do something like this. I mean, it
7 is clumsy and it's just to me -- I just can't believe that
8 somebody would think this was okay.

9 MR. MORAN: I understand that, Your Honor. Again,
10 we've laid out why we believe that Joshua Mast acted in good
11 faith and, again, if you'd like to hear from him, we would
12 call him.

13 I suppose I can move on to the second piece of that
14 which is that plaintiffs also have the burden of establishing
15 that they were harmed by the disclosure.

16 THE COURT: Right.

17 MR. MORAN: Still to this day, even after the Court
18 raised those questions and a year after we filed our motion
19 to lift the protective order on the grounds that we didn't
20 think it had a factual basis, they still have not come
21 forward with any evidence to show that there is actual harm
22 or a heightened risk of harm to them or to their family from
23 these disclosures.

24 If that were all the matter, then we believe that
25 would be enough to defeat the motion, but the facts of this

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 case are sort of extraordinary in that resolve, which is that
2 we know, and there is no dispute, that plaintiffs, through
3 their counsel, have given on-the-record statements to
4 reporters. The Associated Press is here in the courtroom.
5 They've run stories than included on-the-record statements
6 from plaintiffs and their counsel. We know that members of
7 the media have traveled to Afghanistan and spoken with
8 members of their family about the underlying facts of this
9 case and reported on them publicly.

10 So it's difficult for us to accept the
11 representation of the plaintiffs, which is unsupported by any
12 evidence, to merely accept their representation that our
13 client by allowing photographs of their daughter to be posted
14 online, which is something every parent has to make decisions
15 about and deal with, but that by allowing that to happen,
16 that they are putting plaintiffs and their family at danger
17 and risk of identification when there are American reporters
18 and other reporters running around Afghanistan interviewing
19 their family members about the underlying facts of this case.

20 So, again, we think that goes both to the question
21 of whether the protective order should continue forward on an
22 ongoing basis, but it also goes to the question of whether or
23 not they've met their burden of proving by clear and
24 convincing evidence that they were harmed by the conduct that
25 is the subject of the sanctions motion.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 THE COURT: Well, isn't the main -- I mean, they're
2 not prohibited from discussing the case. They just are told
3 they cannot identify --

4 MR. MORAN: Well, Your Honor, the plaintiffs are
5 under no restrictions. If they --

6 THE COURT: Okay. But what is the harm to the
7 defendants in not being able to identify the plaintiffs?

8 MR. MORAN: So, Your Honor, I think I need to
9 separate that into plaintiffs Jane Doe and John Doe, who are
10 the adult plaintiffs, and then Baby Doe who is our client's
11 child whom they've purported to represent and named as a
12 plaintiff in this case and make subject of the protective
13 order.

14 That child lives with our clients. She has for over
15 two and a half years. They have her meet family and friends.
16 People can -- anyone who knows them and knows that they're
17 associated with this lawsuit because their names are included
18 on the docket can see her today and say, Oh, that must be the
19 child that's associated with this lawsuit. So there is a
20 need, I think, to separate the identification of, again, John
21 and Jane Doe, the adult plaintiffs in this case on the one
22 hand, and Baby Doe, the minor child, on the other hand.

23 Our clients' position is that the federal rules
24 already provide for the use of initials in the case of a
25 minor child, that that would be more than adequate

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 pseudonymity for purposes of this case, but if the Court said
2 that Baby Doe were a preferable moniker for the child in the
3 conduct of litigation, then we would understand that.

4 The question about identifying -- so that issue is
5 separated from the harm to plaintiffs because the mere fact
6 that somebody identifies the minor child, knows that she
7 lives with our clients, that she's their daughter, that
8 doesn't give rise directly to any risk in Afghanistan for
9 members of their family.

10 As to their identities, again, there is no
11 insinuation here that their discussions with the Pipe Hitter
12 Foundation included identifying information about who John
13 Doe and Jane Doe really are, what their names are, their
14 address, their identity, any of that information. Our
15 clients have been fastidious about avoiding --

16 THE COURT: But you're complaining about the
17 protective order not allowing you to name the plaintiffs.
18 You're not prohibited from discussing the case as long as you
19 don't name them. That's what I was asking. Why is that such
20 a terrible burden on the defendants?

21 MR. MORAN: Understood, Your Honor. The principal
22 burden of that is in fact development for the case. For
23 example, when we are endeavoring to contact potential
24 witnesses, either in the United States or in Afghanistan, we
25 are limited by the fact of not being able to say, you know,

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 here is the person that we're talking about, unless -- again,
2 Mr. Elliker raised this. We have two choices. We either try
3 to talk around it and find a way to figure out if somebody
4 knows anything without telling them who we're even asking
5 about, or we could go to plaintiffs' counsel and say --

6 THE COURT: Is that a genuine problem or a
7 theoretical problem?

8 MR. MORAN: No, Your Honor, it has been a genuine
9 problem. I mean, our clients have had difficulty contacting
10 potential witnesses based on their understanding that they
11 are unable to tell those potential witnesses who it is that
12 they're interested in asking about.

13 Again, I think what Mr. Elliker did is important to
14 come back to. So he said that the case law under James is
15 very lenient, or perhaps, you know, more lenient on the use
16 of pseudonyms on the docket sheet and in the public filings
17 and the litigation so that if somebody looks up the docket,
18 it says John Doe and Jane Doe and Baby Doe.

19 If that were all we were talking about, we would
20 still have the objections that we raised, but I don't think
21 we would be as concerned about the scope of the protective
22 order.

23 The problem, and what they say, is that these other
24 restrictions are essentially necessary corollaries. That,
25 well, gee, what good is it to have pseudonyms if you don't

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 have an order that prohibits the parties from naming the
2 person that's subject to the pseudonyms. I understand the
3 logic of that, but that's not what James and the related
4 cases say.

5 It precisely is a gag order. That's the piece of
6 the order that we -- that's the reason that we've used that
7 terminology. It's one thing to say that they will be listed
8 as John Doe and Jane Doe and Baby Doe on the docket sheet and
9 in the public filings. It's another thing to say that Joshua
10 and Stephanie Mast are prohibited from identifying them to
11 any third party.

12 I think as this episode illustrates, it's
13 particularly challenging when it relates to their minor child
14 and how they navigate. You know, the last time we were here
15 on the first motion, I believe, if I recall correctly, both
16 plaintiffs and the Court suggested, well, of course we don't
17 think that they would violate the protective order by taking
18 their daughter to the grocery store and having somebody see
19 her and identify her with them.

20 But under the logic of their rule, which is that by
21 any means necessary we need to make sure that nobody can
22 trace a line between a flesh and blood person and the
23 pseudonyms on the docket, there is no logical reason why that
24 and other similar day-to-day activities wouldn't constitute a
25 violation of the protective order as written.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 So, again, our clients have done their best to do
2 what they understand to be their obligations under the
3 protective order, but it's been very challenging under the
4 circumstances.

5 Again, we think for purposes of the motion that's
6 before the Court today, the key questions are, have the
7 plaintiffs proved by clear and convincing evidence that there
8 was a knowingly violation, and have they proved by clear and
9 convincing evidence that their clients were harmed?

10 On that last prong in particular, I think it's hard
11 to show clear and convincing evidence when there simply is no
12 evidence. There is the representation of the counsel. First
13 of all, they acknowledge that there is no actual harm as a
14 result of the disclosure, but they cite cases saying that
15 actual harm is not required.

16 Then they cited three things that they think meets
17 that test. First, the increased risk to non-parties. Again,
18 all we have is their say so. They've not at any point
19 initially when they obtained the ex parte protective order
20 through last year when we filed a motion to lift the
21 protective order or even here today after the Court raised
22 its questions, they have not provided any evidence to
23 substantiate the risk to third parties.

24 THE COURT: Just practically speaking, isn't anyone
25 who came to the United States from Afghanistan during this

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 period of time who stays here any period of time and goes
2 back under some risk, additional risk? I don't mean just
3 might have an accident, but isn't there a real risk?

4 MR. MORAN: Well, Your Honor, that could be. I'd be
5 reticent to say that the Court can take judicial notice of
6 that risk. I think, you know, if plaintiffs wanted to
7 rely --

8 THE COURT: Well, maybe the Court can't take
9 judicial notice that it's an actual risk, but certainly
10 what's published in the news and anyone that reads the
11 newspapers and things think it's very dangerous.

12 You saw people fleeing from Afghanistan. It wasn't
13 all because they wanted to come on a sightseeing trip to the
14 United States. They were actually -- you could draw the
15 conclusion that these people were frightened to death because
16 of their association with the United States.

17 MR. MORAN: Your Honor, I understand that as a
18 matter of human intuition based on current events, but what I
19 would point out is that if that were the case, then I would
20 not expect for plaintiffs to have their counsel making
21 on-the-record statements to the press about this litigation.

22 I would not expect for them to have members of the
23 media traveling around Afghanistan speaking with family
24 members and potential witnesses and then, you know, not
25 seeking to prevent those efforts as well or explaining why

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 those developments, which are the result of their own actions
2 of communicating with the media, talking about the case,
3 trying to generate public interest, getting the media
4 involved to investigate their allegations on the one hand is
5 safe and doesn't create any risk of harm to them or their
6 family even if they return, but on the other hand, our client
7 sharing a link to a Google drive that happens to have some
8 younger photos of their daughter, that's, you know, a crisis
9 that calls out for remedy because it puts their family at
10 risk.

11 THE COURT: Well, there may be two separate things,
12 but you do not agree that there is any risk when a person
13 comes to the United States, such as they did, brings the
14 child, and went back without the child?

15 MR. MORAN: Again, Your Honor, I don't contest that
16 it could be a risk, but I think in order to justify a
17 restriction on our client's ability to speak out about the
18 case, which has a presumptive First Amendment right
19 protection, that they would need to come forward with actual
20 evidence to substantiate that. Maybe that would be in the
21 form of expert testimony, maybe it would be in the form of a
22 declaration from --

23 THE COURT: All right. I understand your position.

24 MR. MORAN: With that, Your Honor, again, we've set
25 forth our position in the briefing. We've offered to put on

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 Joshua Mast and/or -- you know, again, Jonathan Mast is here.
2 He's not our client to represent.

3 Unless the Court has anything --

4 THE COURT: Okay. I was just -- you said that your
5 client was having trouble finding witnesses. Can you tell us
6 any idea of how many witnesses there were? Have you tried
7 to --

8 MR. MORAN: I could confer briefly with my client.
9 I'm aware of one particular incident where it's created an
10 issue, but I could confer briefly if the Court --

11 THE COURT: Okay. Well, I mean, you could have
12 asked the magistrate judge in this case to allow you to
13 change that aspect of the order, couldn't you? I mean, did
14 you do that?

15 MR. MORAN: Well, we filed a motion to amend the
16 protective order about a year ago, and it has not been
17 resolved, Your Honor. But we did not specifically go to
18 Judge Hoppe and say, We have one particular witness. Can you
19 give us relief from the protective order. I mean, perhaps we
20 would in the future if that would be the way to go.

21 THE COURT: Okay. Thank you. Did Jonathan's
22 counsel wish to address the Court?

23 MR HARDING: Good afternoon, Your Honor. I'll be
24 brief. My name is Elliott Harding. I'm here on behalf of
25 Jonathan Mast.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 I recognize that neither party, nor does the Court,
2 have a prehearing brief from us on this issue, so I'm not
3 going to try to argue outside of some general things that I
4 think have already been addressed.

5 We're not here to argue on behalf of Joshua Mast,
6 but we believe that any liability to Jonathan, to my client,
7 would naturally have to flow from Joshua being held to be in
8 contempt, so they do somehow collapse into each other.

9 Ultimately, we don't believe that Joshua Mast is
10 Jonathan's -- they're brothers, but as the axiom is, you're
11 not your brother's keeper. I think that Joshua Mast is not
12 responsible for Jonathan Mast being an interested person in
13 seeing litigation advanced in a noble and well-funded way,
14 and that's what we have here.

15 The standard would be actual notice that my client
16 could somehow fall within the scope of this Court's
17 protective order. Now, he did testify that he had read the
18 order through his own due diligence of finding such order,
19 and he shouldn't be punished because as a layman he actually
20 took affirmative steps to try to be compliant with something
21 so that he didn't get his brother in trouble.

22 I say that because there is no evidence that this
23 Court or that the plaintiffs' counsel sent an order to my
24 client after the protective order was issued as some type of
25 a preemptive warning after it was issued to say everybody in

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 Joshua Mast's immediate family better take note that they
2 can't talk or show pictures of their niece in this case.

3 There is no evidence that Jonathan sent this Google
4 link to my client after having had a Signal conversation with
5 Pipe Hitter. This is an active Google link that I believe
6 the family just shares generally, and it preexisted any type
7 of conversation with Pipe Hitter.

8 So that's one thing is what is the impetus of these
9 pictures even existing or being in my client's possession,
10 and that's just based on family. It's not based on the idea
11 of going out and courting media.

12 There is no evidence that Joshua Mast had any
13 knowledge as to any network that Pipe Hitter could
14 potentially bring into the ambit of media coverage. So there
15 is no evidence that Jonathan, I mean, that Joshua knew that
16 my client would have any conversations with One America News
17 Network or any network. It could have been any network.
18 Joshua had no communication --

19 THE COURT: Wasn't there evidence that Joshua told
20 Pipe Hitter that he couldn't do it, but his brother might be
21 a good -- would be a good source to talk to?

22 MR. HARDING: That is literally the only link.

23 THE COURT: I mean, does there have to be another
24 link?

25 MR. HARDING: It could have been the neighbor. It

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 could have been a church member. Just because there are
2 other people out there in the world that have a vested
3 interest in Joshua's case, does not make them agents. He
4 knows what he can and cannot do, and he acted accordingly,
5 Joshua did. He did not --

6 THE COURT: Well, it was pretty clear in the
7 protective order that Joshua couldn't act himself or through
8 agents and representatives.

9 MR. HARDING: Correct, but in the conversation with
10 Pipe Hitter -- again, just going off what the plaintiffs have
11 referenced. I don't have his whole transcript. I wasn't a
12 party to that deposition.

13 I don't believe that there is any reference to the
14 idea that, oh, you can go talk to my brother, and he'll
15 provide pictures, or he'll breach pseudonymity, but I can't
16 do that. All he said was, effectively, I'm not allowed to
17 talk about it. There are other people out there that might
18 talk about it. That was the end of any direction. That is
19 literally that there is someone else in the world that might
20 be interested.

21 I think that's notable because he didn't send my
22 client their contact information for Pipe Hitter and say go
23 call this woman, she wants to talk to you. That's not what
24 happened. He didn't affirmatively --

25 THE COURT: Joshua told her to call his brother,

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 right?

2 MR. HARDING: He said that he might be someone that
3 she could talk to, but there is a big difference -- we're
4 talking about agency relationship, and that's really what is
5 at issue here.

6 There is a big difference between telling someone
7 that there is a third party in the world that might be vested
8 in seeing our case go well and might talk to you versus him
9 affirmatively telling my client and directing him to go do it
10 and say, I can't do it, but can you go do it for me? I know
11 that sounds like a distinction without a difference, but --

12 THE COURT: I mean, it sounds like something you
13 would hear in moot court in junior high school, frankly. I
14 mean, it doesn't sound like a serious legal argument.

15 MR. HARDING: Well, what I think is a serious legal
16 argument is the First Amendment and due process components to
17 my client being held in contempt. He was not represented --

18 THE COURT: Well, I think that's your issue too, but
19 that's not what you're arguing.

20 MR. HARDING: Well, I was just going to the factual
21 aspect. The Court has rightfully noted the one caveat in the
22 entire 14 points that the plaintiffs point to is that my
23 client's name came up in one conversation with Pipe Hitter
24 saying he might be somebody you could talk to.

25 They mentioned Signal conversations being deleted or

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 something like that. What we don't know is whether or not --
2 no one directed my client what to do with those photos, yet
3 there is evidence in Joshua Mast's brief and in the
4 depositions referencing that he asked them to blur out the
5 photos, and the only photos that he thought were being
6 referenced were things that were already in the public
7 domain.

8 So at the end of the day, it's really not any -- if
9 a neighbor across the street were to be interested in this
10 case and take a picture of the Mast children playing in their
11 front yard, knowing the plight that they feel like they're
12 going through, and be sympathetic and say, These are people
13 I've known my whole life. Here is their family. No blurring
14 the photos, just goes out there and does it, puts pictures of
15 this young person up online, does a Go Fund Me and raises,
16 \$10-, \$20-, \$30,000 and puts their name all over it, no one
17 would say that that person would fall within the purview of
18 this court's protective order.

19 All we have here, the only way we get there is the
20 idea that when he spoke to Pipe Hitter -- not knowing what
21 Pipe Hitter would necessarily end up doing, mind you -- he
22 said, I can't talk to you. You might want to talk to my
23 brother. That's it. He didn't say, My brother will go on
24 the news and show you the exact pictures you're asking for or
25 anything like that. He didn't tell my client to do that. If

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 anything, I think he would have told him not to do that.

2 The reason I say that is because in my client's
3 deposition when he talks about if he had any conversations
4 with Joshua or his wife about Pipe Hitter, he said he didn't
5 because he was trying to a keep a distance. Not because he
6 was trying to keep plausible deniability, but because he
7 doesn't believe he falls within the purview of this Court's
8 protective order, and I think he's right.

9 He wasn't on actual notice. He was not listed by
10 name. The plaintiffs could have asked for that. Talking
11 about maintaining a protective order, they could ask to
12 expand a protective order. I don't think that would be
13 appropriate, but they're not asking for that today.

14 They could have asked to include all the brothers or
15 the parents or the cousins. Anyone in the family can't post
16 pictures anywhere of their own family member or to talk about
17 what is an issue of public importance, international
18 important, and very personal importance to my client. He
19 wasn't served with anything about the protective order. He
20 didn't have counsel at the protective order hearing.

21 Mind you, I think it's notable that Pipe Hitter
22 isn't here today. The plaintiffs intentionally reference in
23 their brief that they dropped them as a party because after
24 review they considered them an innocent pawn in the matter.
25 Yet they had legal counsel, they were informed about a

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 protective order. My client didn't and wasn't as far as
2 being legally notified.

3 When a lawyer is told that there is a protective
4 order involved, you would think there is some due diligence
5 necessary before they start putting up pictures and calling
6 people to speak. Yet if they're an innocent pawn in that
7 matter, I don't see how my client isn't as well. They're the
8 impetus of any network connections, any media --

9 THE COURT: They didn't desist after they knew about
10 the protective order.

11 MR. HARDING: They knew about the protective order
12 before they even contacted my client.

13 THE COURT: Right, but when they knew the actual
14 terms of the order, they didn't desist.

15 MR. HARDING: Right, but they didn't take any
16 affirmative -- the plaintiffs noted all the --

17 THE COURT: You may be right, they may be guilty.
18 But like you say, they're not here. That's not a defense to
19 somebody else, that somebody else is equally guilty.

20 MR. HARDING: Well, I think it just goes to the
21 weight of the plaintiffs' argument because it's not that the
22 Court has dropped them in the matter, it's that they
23 effectively concede that they're an innocent party.

24 I'm just saying to the weight of the argument that
25 my client is somehow a guilty party, I'm arguing that he's

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 just as innocent, if not more so, because he was not legally
2 represented at the time. He was not the one that's handling
3 PR and putting people on networks. In fact, he told them to
4 blur certain things in order to take good faith efforts to
5 make sure there was no backlash.

6 I say all of this because we've got some serious
7 concerns about his speech being limited and him not being on
8 any actual notice, which is the standard for an agent or an
9 aider and abettor in this type of situation.

10 He could read it all day as a layman, but that's not
11 the type of notice we're talking about from a due process
12 standard. He was not actively represented. He was dealing
13 with -- everybody else in this conversation was actively
14 represented, including Pipe Hitter.

15 He's acting under a good faith assumption that his
16 own layman reading of the order he's allowed to act. He's
17 not named in it. It doesn't mention him by reference, such
18 as immediate family. He takes affirmative steps to blur any
19 photos. The photos that were provided had already been in
20 the public domain. And he was talking to a represented
21 entity that assists in these types of matters thinking
22 that --

23 Now, granted, there is no evidence as to whether or
24 not he knew that they did or did not have the protective
25 order, and to the Court's point, once Pipe Hitter got the

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 actual physical protective order, they took affirmative steps
2 to remove these things from online presence.

3 But, again, if that makes them an innocent actor, I
4 think my client is just as innocent because of his steps to
5 blur these things out, avoid any type of contact with his
6 brother, and, honestly, he might have said things that his
7 brother didn't like or wouldn't have wanted him to say in the
8 first place.

9 There is no definition of the scope of the agency
10 that they're trying to proffer to this court. There is no
11 conversation saying go on to Pipe Hitter and do this, I'm not
12 allowed to do it. That's not what we have. What we have is
13 you might get contacted by these people.

14 Jonathan could have easily said no. Jonathan could
15 have gone out and done this previously. He could have done
16 it on his own accord, which he effectively did. He could
17 have gone to secondary or third parties that did the same
18 thing Pipe Hitter does. He could have done his own Go Fund
19 Me account and raised it on his own without having to use a
20 charitable intermediary for press purposes.

21 I don't think -- I think the plaintiffs would still
22 be making the same argument, though. That's what I'm trying
23 to say. I don't think the evidentiary hook that they're
24 trying to have this Court rely on exists. We have Pipe
25 Hitter learning my client's name, and my client being

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 forewarned that he might hear from this entity. That's the
2 extent.

3 Now, the idea that money exchanged hands is
4 irrelevant. My client could have pocketed it all, and he
5 would have had a breach of contract or a fraud claim between
6 him and Pipe Hitter, but he could have personally went \$5,000
7 prior to talking to Pipe Hitter and just used this as a way
8 to get his money back. They're not saying he's aiding and
9 abetting in breach of the protective order because he's
10 loaning many to his brother. The money is not what's at
11 issue here.

12 My client is the one who signed the document knowing
13 that it was just between him and Pipe Hitter. He didn't go
14 out and have his brother review the terms before he signed
15 it. There is just so much more evidence. They're saying
16 there are things that Joshua --

17 THE COURT: Didn't they send the agreement to his
18 brother, and the brother sent it back and said, Well, I can't
19 sign it, you sign it?

20 MR. HARDING: He had already said he can't be a part
21 of it, meaning -- his name was referenced in it, but he
22 didn't say these terms, you know, edit this, amend this, make
23 sure you do that. We don't have that.

24 I think it matters significantly, again harping on
25 two primary issues, First Amendment, just because he's his

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 brother doesn't mean he has to keep his mouth closed. If
2 that's what the plaintiffs wanted, they should have asked for
3 that. I don't know how that would have stood up with this
4 Court's review, but I'm just saying that they should have
5 asked for it, and maybe they can ask for it tomorrow. But he
6 wasn't a part of it.

7 Then it goes to due process. To hold him in
8 contempt for something that he had no legitimate actual
9 notice of -- granted, he did read it himself, but that's not
10 a court directive, that's not legally represented, and it's
11 not like a cease and desist or a forewarning type of letter
12 from opposing counsel to put you on notice and say go hire
13 counsel so they --

14 THE COURT: So all he did was aid and abet his
15 brother in getting around the protective order; is that
16 correct?

17 MR. HARDING: That's what they're arguing, but
18 that's not his position. He wasn't trying to --

19 THE COURT: I know it's not his position, but what
20 are the facts other than that?

21 MR. HARDING: He wants to aid with his brother
22 having strong litigation, but violating the protective order
23 is not what he sought to do. That's why we have blurred
24 images. That's why we have pseudonymity being maintained. I
25 think the blurred images is a huge recognition that my client

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 is not looking to aid and abet Joshua doing anything other
2 than litigating the case generally and having a good outcome.

3 THE COURT: Okay.

4 MR. HARDING: We also don't have evidence that he
5 spoke to Joshua's attorneys about this going beforehand.
6 There is nothing to say they told him he could do it. There
7 is just a huge lack here. We do --

8 THE COURT: Well, what about the fact that telephone
9 records were erased after a few days?

10 MR. HARDING: The Signal app, I think it's wrong to
11 view an app that has automatic deletion as some type of
12 spoilage argument that weighs against an evidentiary finding.
13 I find that to be disingenuous.

14 THE COURT: Would that not be a spoliation problem
15 in any other case?

16 MR. HARDING: Not -- I mean, my client is not the
17 one who had that issue, so I can't speak to it. I just find
18 it to be --

19 THE COURT: Well, I mean, you're rendering an
20 opinion.

21 MR. HARDING: If the Court is just asking for an
22 opinion about the use of Signal, there are plenty of
23 innocuous reasons that people want to have their messages on
24 automatic deletion.

25 THE COURT: I know, but when you're in litigation

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 and you deliberately are using something that erases your
2 communications, isn't that a problem?

3 MR. HARDING: Well, we don't --

4 THE COURT: Okay.

5 MR. HARDING: As someone who actively uses that
6 application, along with others that automatically delete, and
7 the Court is digressing into just pure opinion on the matter.
8 We don't have evidence of how many other conversations he was
9 having that were also being deleted. All of his
10 conversations were likely being deleted within five days, or
11 however long he set the timer to.

12 We also don't know if he's the one that set the
13 automatic delete, right? It could have been the other party.
14 That's how those apps work. That's why I think it's wrong to
15 read too much into that because there is so much dynamics
16 into that type of thing.

17 I think it's a stretch to say that Joshua Mast was
18 somehow facilitating my client to aid and abet him purely
19 because some messages went away.

20 THE COURT: Okay. Well, I got into this because you
21 said there was no evidence of them talking, and that was, you
22 know, some reason where there may not be that evidence. But
23 I understand your position.

24 MR. HARDING: Ultimately, we just think it would be
25 an unfounded and arguably unconstitutional sanction for my

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 client to be brought within the scope of this. We don't
2 believe Joshua Mast is his brother's keeper in this matter.

3 With that, we would ask for, obviously, my client
4 not to be held in violation of an order that he was not named
5 in or served with. Thank you.

6 THE COURT: Okay. Thank you. Go ahead.

7 MS. ECKSTEIN: Thank you, your Honor. Mr. Elliker
8 is going to address specifically the protective order issues,
9 but I want to address items stated by both Mr. Moran and
10 Mr. Harding.

11 With respect to Mr. Moran, he's again emphasizing
12 this lack of actual harm. The case law is very clear.
13 Actual harm is not required, and he does not address the
14 other harms that we raised in our brief, including harm to
15 the Court itself, harm with respect to the expenditure of
16 time, resources, money, by the parties and the Court in terms
17 of time, of course.

18 We've heard this before, this argument that it
19 should be okay for his clients to post photographs of Baby
20 Doe. I get it. We're not saying otherwise. What they can't
21 do is tie that to this litigation. If they hadn't given
22 photographs that identified Baby Doe to the Pipe Hitter
23 Foundation but given ones of her from her back, for example,
24 or from some other way so that she can't be identified, we
25 would not be here today. As well as with respect to the One

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 America News Network. If they hadn't provided those
2 photographs to the Pipe Hitter Foundation or the One America
3 News Network, we would not be here today.

4 The protective order, as you know, I've heard from
5 Mr. Harding that his brother didn't think the protective
6 order applied to him, that Jonathan Mast didn't think that.
7 It does refer to representatives and agents. Of course, they
8 are also prohibited, and in this case Jonathan Mast was
9 acting as Joshua Mast's representative.

10 Also, he did testify, Jonathan Mast did testify that
11 he was aware of the protective order, and he was aware of
12 protective order before he even got into contact with the
13 Pipe Hitter Foundation. That's in his deposition. It's
14 cited in the PowerPoint that I provided to the Court, so the
15 citations are there.

16 Mr. Harding said there was just one conversation --
17 yeah, just this one conversation about Joshua saying, Well,
18 Jonathan can do those, can talk to the Pipe Hitter Foundation
19 as opposed to me.

20 There are several instances in Ms. Disarro's
21 declaration in which she specifically references a couple of
22 different conversations in which Joshua Mast told her, I
23 can't be in a public-facing capacity, but my brother can. I
24 can't sign the grant agreement, but my brother can. And
25 those are paragraphs 62, 63, 69, and 75 of her declaration.

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 I may have misunderstood Mr. Harding. I heard him
2 say that he wasn't present at a deposition. The only
3 deposition we've taken thus far of Jonathan Mast, he was
4 there. I may have misunderstood what he said, but I just
5 wanted to make that clear.

6 Mr. Harding also made some comments about, well, the
7 Pipe Hitter Foundation knew about the protective order before
8 Jonathan Mast. I want to be clear about a couple of things.

9 As I said, Jonathan Mast testified that he knew
10 about the protective order even before he contacted the Pipe
11 Hitter Foundation. Ms. Disarro said she did not -- that the
12 Pipe Hitter Foundation did not have a copy of the protective
13 order until we reached out to them with a cease and desist
14 letter. The cease and desist letter that we sent to the Pipe
15 Hitter Foundation, we sent one to Jonathan Mast, I believe on
16 the same day.

17 Also, Mr. Harding said that Jonathan Mast acted in
18 good faith in some way. He even told the Pipe Hitter
19 Foundation to blur out some photographs. I'd like to point
20 Your Honor to Exhibit I of our prehearing brief. That's also
21 been submitted to the Court in the binder. Exhibit I, this
22 is a text from Jonathan Mast to Dena Cruden. Dena Cruden, by
23 the way, is the same person as Dena Disarro. She got
24 married, so it's Dena Cruden-Disarro.

25 It's dated Wednesday, June 14th. We sent the cease

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 and desist letter to Jonathan Mast the day before, and he
2 specifically says in this text message to Ms. Cruden, this is
3 after the Pipe Hitter Foundation has already posted the
4 identifying photographs in connection with this litigation,
5 and he says, "I got a cease and desist letter from the
6 opposition's law firm specifying that he had not blurred that
7 out," meaning that Eddie Gallagher had not blurred out some
8 of Baby Doe's face, "and that they might claim that I am
9 breaking the protective order."

10 "Seeing as how that photo" -- the specific photo
11 he's referring to is the one, I believe, where it's Baby Doe
12 standing on the exercise equipment. Jonathan says, "Seeing
13 as how that photo came from me and wasn't one of the ones
14 that aired on CBS, thus already in the public domain, I think
15 it would behoove us to take a precaution to blur it out like
16 the one on Pipe Hitter's Instagram account. I hope that
17 makes sense."

18 All he asked to be blurred out where photographs
19 that he thought were already in the public domain, even
20 though he also knew that we had filed a motion to show cause
21 as to the photographs that were displayed on the CBS
22 broadcast. So this wasn't innocent. He knew exactly what he
23 was doing as well.

24 Again, with respect to the protective order, in his
25 deposition he testified that he saw it, he read it, he

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 understood it.

2 Then finally to your questions, just real briefly,
3 about the Signal messaging app. My understanding is that
4 those settings can be changed for every single message
5 stream. So Joshua Mast could have changed those settings,
6 but he didn't in the middle of this litigation when he is
7 texting about this litigation.

8 Not only that, but Ms. Disarro avers in her
9 declaration, she says in her declaration that she can see on
10 her app that it is Joshua Mast who has the auto delete
11 settings on, auto delete within one week. So it's not
12 someone else that had the auto delete settings on, it is
13 Joshua Mast who had those auto delete settings on. So there
14 is likely a trove of correspondence back and forth that we
15 have not seen and we don't have access to anymore.

16 I'll turn it over to my colleague at this point
17 unless you have any questions.

18 THE COURT: No questions. Go ahead. Well, just a
19 minute. Speak to the point they raised that your clients
20 were making these public statements and revelations before
21 they were or at the same time.

22 MS. ECKSTEIN: So my clients did speak with certain
23 news outlets, specifically the Associated Press and the New
24 York Times, but only on the condition, which the reporters
25 honored, that they not be identified. Our clients were not

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 identified in any of the news articles that were published.

2 I heard something about how we should have somehow
3 controlled the media, prevented them from going to
4 Afghanistan. I'm sure the Associated Press would laugh at
5 that, frankly. We can't control them. John Doe and Jane Doe
6 can't control what the press does.

7 They on their own, the Associated Press, decided to
8 go to Afghanistan and did its own investigation, and it got
9 that information on its own, not from our clients.

10 THE COURT: Well, the information that got out there
11 once they started their interviews with people, did that put
12 the information out into the public so that this protective
13 order was no longer effective?

14 MS. ECKSTEIN: So our clients did not know about
15 what the Associated Press was doing until it was reported.
16 So they had no idea.

17 To the extent -- we don't know what it is the
18 Associated Press told whomever they spoke with in
19 Afghanistan. We don't know -- we don't know if they used
20 names. We don't know what they did.

21 So that fear still exists. I think, as you started,
22 the idea of them going back, our clients going back to
23 Afghanistan without the little girl, is deathly worrying to
24 them.

25 THE COURT: Well, they couldn't go back now once

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 they've asked for asylum. I mean, that's out of the
2 question.

3 MS. ECKSTEIN: Absolutely. Remember, one of the
4 reasons they asked for asylum is because of this fear,
5 because they can't go back without her. Then there is the
6 risk to the innocent civilians who remain in Afghanistan, the
7 family members and the like.

8 You know, I don't know what the Taliban knows. They
9 don't know what the Taliban knows. All we know is that the
10 Associated Press did some investigation and reported on that
11 investigation. We do not know what they said to whom, what
12 they revealed to whom, any of that information.

13 THE COURT: Okay. Thank you.

14 MS. ECKSTEIN: Thank you.

15 THE COURT: All right.

16 MR. ELLIKER: Thank you, your Honor. I'll be very
17 brief I think, just on a few of the legal questions or the
18 arguments that my friend Mr. Moran raised.

19 First is in terms of the mechanics of the protective
20 order, some discussion about how this affects the plaintiffs'
21 ability to conduct discovery. I take Mr. Moran at his word,
22 the representation that it has had some effect, at least as
23 to one particular witness, although, you know, I don't know
24 that it necessarily is a blanket restriction on the ability
25 to conduct discovery, but that's not an argument that has

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 been raised by the Masts insofar as the issues put before the
2 Court on the motion to modify the protective order or their
3 response, their prehearing response.

4 They want the protective order lifted, right? The
5 relief they request in their motion filed last January is to
6 deny the plaintiffs leave to proceed under pseudonyms, remove
7 restrictions on the use of their real names, maintain privacy
8 for the baby, and then allow filings from the circuit court
9 having -- there's, you know, a connection to the way that
10 sealing works in the circuit court to this one.

11 So the issue is, I suppose, an interesting one as to
12 the mechanics of it, and maybe there is a way that that could
13 be a discussion as to a more, you know, a slight tailoring
14 for a particular issue in discovery, but that's not the issue
15 that's been put before the Court through the motion that the
16 plaintiffs -- sorry, that the Masts have filed.

17 I'll also note, Your Honor, that the language that's
18 in the protective order about how to handle the use of the
19 pseudonyms and the protection of the identity of the
20 plaintiffs during the course of discovery is verbatim from
21 James v. Jacobson. So it's not as though that was invented
22 out of whole cloth and plucked out.

23 Again, I think we're all on the same page that the
24 idea of the protective order going forward is a distinct
25 issue as to the contempt issue, but insofar as the Court is

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 considering how to handle the protective order going forward,
2 I think that if there is some kind of discovery-related
3 issue, maybe that's something that could be addressed in
4 particular, but it's certainly not something that's been teed
5 up by the plaintiffs -- excuse me, by the Masts' motion on
6 this.

7 I think as your discussion with Ms. Eckstein just
8 pointed out, particularly as it relates to the asylum, the
9 risk of harm I think is indisputable, right? I mean, that is
10 certainly I think something the Court could recognize is a
11 finding of the United States government with respect to the
12 granting of asylum.

13 I don't think we have to talk about judicial notice.
14 I think we can talk about common sense with regard to the
15 connection of that risk of harm as to innocent parties would
16 remain in Afghanistan. I don't think that we need to have to
17 have additional proof of specific risk of harm to particular
18 people who remain in Afghanistan.

19 Sorry, Your Honor. Ms. Eckstein stole some of my
20 points. Unless Your Honor has any additional questions, I
21 think that's all.

22 THE COURT: All right. Thank you.

23 Thank you-all. I appreciate your presentations and
24 briefing. I'll rule promptly on this, I promise you.

25 I would say in the meantime I caution the defendants

—Doe, et al v. Mast, et al (3:22cv49) - Motion Hearing 5/29/2024—

1 and Jonathan Mast to abide by the terms of the protective
2 order until such time as the Court rules on the defendants'
3 motion to vacate or modify the protective order.

4 All right. Thank you-all. We'll recess court.

5 (The proceedings concluded at 2:39 p.m.)

6
7 CERTIFICATION

8
9 I certify that the foregoing is a correct transcript
10 from the record of proceedings in the above-entitled matter.

11
12
13 _____/s/_____

14 Cynthia L. Bragg

15 June 6, 2024
16
17
18
19
20
21
22
23
24
25